

## **CITY COUNCIL AGENDA REPORT**

**SUBJECT: EXCLUSIVE RIGHT TO NEGOTIATE AGREEMENT WITH  
CHELSEA INVESTMENTS FOR THE PROPERTY AT THIRD AND HEBER  
AVENUE**

**AGENDA DATE: November 5, 2008**

**PREPARED BY: Rosalind Guerrero, Redevelopment Director**



**APPROVED FOR AGENDA BY: Ralph G. Velez, City Manager**

**RECOMMENDATION: It is recommended that the City Council extend the exclusive right to negotiate agreement for a period of 90 days.**

**FISCAL IMPACT: There will be staff time spent to negotiate a possible land transfer/disposition and development agreement ("DDA").**

**BACKGROUND INFORMATION:** Chelsea Investments has proposed to develop and construct an "in-fill" development project consisting of mixed uses including affordable housing on the property that the City currently owns at 3<sup>rd</sup> & Heber Avenue. An Exclusive Negotiating Agreement was signed on April 2, 2008. The current ENA has a 180-day exclusive negotiating period subject to 2 thirty-day extensions at the discretion of the City Manager. The ENA will end on December 2, 2008. The ENA agreement does not include any deposits by the developer. The ENA does not bind the City/RDA in any way to actually sell the property to Chelsea. It merely sets forth a term in which the City/RDA will exclusively negotiate with Chelsea Investments.

**CURRENT DISCUSSION:** The developer is requesting an extension of an additional 90 days from December 2, 2008 to March 2, 2009. Negotiations will include the terms of a sale of the City's land and any RDA assistance via the Housing set-aside monies. The City and RDA and Chelsea Investments hope to negotiate a Development Disposition Agreement (DDA) by the end of the 90-day period. Staff recommends a deposit be made by the Developer that will pay for City attorney's fees related to the DDA and related documents. An initial deposit of \$10,000.00 is recommended to be paid by the Developer before review of the DDA is started.

**RECOMMENDATION:**

1. Approve a 90 day extension of the current agreement with Chelsea Investments;
2. Require an initial \$10,000.00 deposit to be used towards fees incurred with the review of the DDA and related documents.

**EXCLUSIVE RIGHT TO NEGOTIATE AGREEMENT  
(Third Street & Heber Ave.)**

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This Exclusive Right to Negotiate Agreement ("ERN" or "Agreement") is entered into as of April 2nd, 2008 by and between the City of Calexico, a public body, corporate and politic ("City"), the Community Redevelopment Agency of the City of Calexico, a public body, corporate and public ("RDA"), and Chelsea Investment Corporation, a California private corporation ("Developer"), with reference to the following facts:

**RECITALS**

- A. The City owns property at Third Street and Heber Avenue ("Property") which currently serves as a parking lot. The Developer seeks to develop a mixed-use, low-income housing project in this location and has requested the City and RDA enter into the ERN with respect to the sale of the Property.

WITH REFERENCE TO THE FACTS RECITED ABOVE, the Parties agree as follows:

**ARTICLE 1**

**EXCLUSIVE NEGOTIATION RIGHT**

**Section 1.1 Good Faith Negotiations.**

During the Negotiating Period described in Section 1.2, the Parties shall diligently and in good faith negotiate the terms of a sale of the Property.

The express intent of this ERN is to provide a preliminary outline of the basic terms of a Disposition and Development Agreement ("DDA") between the RDA and the Developer; discussion of amount and type of assistance being requested of the RDA and/or the City by the Developer; discussion regarding the applicable restrictive covenants to be recorded against the development; feasibility of the project (in relation to the price and terms of the sale of the Property, types of uses, public benefit, scale of the project, and assistance by the City or the RDA), affordable housing requirements, and a potential grant or loan for predevelopment expenses.

In the event at any time during the Negotiating Period that Developer does not negotiate diligently and in good faith as determined by City and RDA in their reasonable discretion, City or RDA shall give written notice with a description of the failure and an explanation of the actions needed to cure, thereof to the Developer who shall then have fifteen (15) calendar days to negotiate in good faith to the reasonable satisfaction of City and RDA. Following the receipt of such notice and the failure of Developer to thereafter negotiate in good faith within said fifteen (15) calendar days, this Agreement may be terminated upon written notice by City or RDA to the Developer.

### **Section 1.2 Negotiating Period.**

The Negotiating Period under this Agreement shall be one hundred and eighty days (180) from the date of execution of this Agreement. The Negotiating Period shall be subject to an extension at City's discretion, which may be exercised by the City Manager of the City. The City shall be authorized to extend the Negotiating Period for no more than two (2) thirty (30) day extensions. If the Developer requests extensions of this Agreement, Developer shall provide documentation as to why additional time is necessary under this Agreement. The Developer also understands that such an extension in no way obligates the City or RDA to sell any property at the end of the negotiations.

If the Parties have not negotiated a DDA or other agreement for the sale of the Property from the City to the Developer by the expiration of the Negotiating Period (as the Negotiating Period may be extended by operation of the preceding paragraph), then this Agreement shall terminate except as set forth in Section 3.4.

The duration of the Negotiating Period shall be extended by the duration of any "Event of Force Majeure" that may occur from time to time during the term hereof. The term "Event of Force Majeure" shall mean any and all acts of God, strikes, lock-outs, other industrial disturbances, acts of the public enemy, laws, rules and regulations of governmental entities, wars or warlike action (whether actual, impending, or expected and whether de jure or de facto), insurrections, riots, vandalism, terrorism, epidemics, inclement weather, fire or other casualty, civil disturbances, confiscation or seizure by any government or public authority, lawsuits brought by third parties, governmental or administrative action, inaction or omission, or any other causes, whether the kind herein enumerated or otherwise, that are not reasonably within the control of or caused by the party claiming the right to delay the performance on account of such occurrence; provided, however, in no circumstances shall the monetary inability of a party to perform any covenant, agreement or other obligation contained in this Agreement be construed to be an Event of Force Majeure. Upon either party hereto becoming aware of an Event of Force Majeure, it shall promptly notify the other party hereof of such occurrence.

### **1.3 Exclusive Negotiations.**

During the Negotiating Period (as such Negotiating Period may be extended by operation of Section 1.2), the City and RDA shall not negotiate with any person or entity, other than the Developer, regarding sale of the Property. Nor may the City or RDA solicit or entertain bids or proposals for development of the Property from anyone other than Developer.

The term "negotiate" as used in this Agreement, means and refers to the City and/or RDA engaging in any discussions, whatsoever, regardless of how initiated, with a third party with respect to that third parties' (potential) development of area described in the preceding paragraph (to the total or partial exclusion of Developer), except for the City or RDA stating that it is then subject to an exclusive negotiating agreement with Developer.

## **ARTICLE 2**

### **NEGOTIATION TASKS**

#### **Section 2.1 Overview.**

To facilitate negotiations of the sale of the Property, the Parties shall use reasonable good faith efforts to accomplish the tasks set forth in this Article 2 in a timeframe that will support negotiations and execution of a mutually acceptable DDA prior to the expiration of the Negotiating Period.

#### **Section 2.2 Reports.**

The Developer shall promptly provide the City and RDA with copies of all final reports, studies, analyses, and similar documents prepared or commissioned by the Developer with respect to this Agreement and the development of the Property upon their completion, excluding attorney/client privileged documents, draft documents, and non-assignable documents. The City and RDA shall promptly provide the Developer with copies of all reports, studies, analyses, and similar documents prepared or commissioned by the City and RDA with respect to the Property, this Agreement and the Development upon their completion. Nothing in Section 2.2 obligates the City or RDA to undertake any new studies or analyses. City has ordered an appraisal of the Property as described in this ERN. Within ten (10) days after execution of this ERN, Developer agrees to pay the City an amount equal to 50% of the costs of the appraisal. Buyer understands that the City shall be entitled to choose the appraiser.

#### **Section 2.3 City Procedures.**

The Developer acknowledges that the sale of City-owned/public land requires the City Council to go through certain procedures. This Agreement is strictly an agreement to negotiate and does not bind the City or RDA to a sale of land. Developer acknowledges that the proposed sale of public land may need to go through certain notice, hearing, and protest procedures as outlined in Government Code sections 37420 *et. seq.* and/or Health and Safety Code Section 33433, and that the City and RDA may hold public hearings to gather public input on the proposed project. Developer also acknowledges that any funding to be provided to Developer under the twenty percent set aside funds of the RDA will require that Developer comply with all applicable affordable housing requirements, including Health & Safety Code sections 33334.2 *et. seq.* and 33413.

#### **Section 2.4 Planning/Environmental Review.**

The Developer understands that this agreement does not absolve them of the responsibility to go through any planning procedures or environmental review as is required by state and local law for any development that Developer seeks to do. When appropriate, the City and RDA shall assist and cooperate with the Developer in the Developer's compliance with this Section.

## ARTICLE 3

### GENERAL PROVISIONS

#### Section 3.1 Limitation on Effect of Agreement.

This Agreement (and any extension of the Negotiating Period) shall not obligate either Party to enter into any particular agreement. Execution of this Agreement by the City and RDA is merely an agreement to conduct a period of exclusive negotiations in accordance with the terms hereof, reserving for subsequent City and RDA action the final discretion and approval regarding the sale of any land and all proceedings and decisions in connection therewith. Any sale of land resulting from negotiations pursuant to this Agreement shall become effective only if and after such sale has been considered and approved by the City and/or RDA (if required by law) following conduct of all legally required procedures.

#### Section 3.2 City Discretion.

By its execution of this Agreement, the City and RDA are not committing themselves to or agreeing to undertake: (a) any disposition of land to the Developer; or (b) any other acts or activities requiring the subsequent independent exercise of discretion by the City, the RDA, or any agency or department thereof. This Agreement does not constitute a disposition of property or exercise of control over property by the City or RDA and does not require a public hearing. Execution of this Agreement by the City and RDA is merely an agreement to enter into a period of exclusive negotiations according to the terms hereof, reserving final discretion and approval by the City and RDA as to any sale of the land and all proceedings and decisions in connection therewith.

#### Section 3.3 Notices.

All notices and other communications permitted or required hereunder shall be in writing and shall be served by personal delivery or by deposit in the United States mail, postage paid, addressed to the respective parties as follows:

To City:	City of Calexico 608 Heber Avenue Calexico, CA 92231 Attention: Ralph Velez, City Manager
To RDA:	Community Redevelopment Agency of the City of Calexico 608 Heber Avenue Calexico, CA 92231 Attention: Ralph Velez, Agency Executive Director
To Developer:	Chelsea Investment Corporation 5993 Avenida Encinas, Suite 101 Carlsbad, CA 92008

Any notice or other communication served by personal delivery shall be deemed served when delivered. Any notice or other communication deposited in the United States Mail as provided above shall be deemed to have been served two days after the day of deposit.

#### **Section 3.4 Costs and Expenses.**

Except as provided elsewhere in this ERN, each Party shall be responsible for its own costs and expenses in connection with the activities and negotiations undertaken in connection with Agreement and the performance of each Party's obligations under this Agreement.

#### **Section 3.5 No Commissions.**

The City and RDA shall not be liable for any real estate commissions or brokerage fees that may arise from this Agreement or any sale that may result from this Agreement. The City and RDA each represents that it has engaged no broker, agent, or finder in connection with this transaction. The Developer shall defend and hold the City and RDA harmless from any claims by any broker, agent or finder retained by the Developer.

#### **Section 3.6 Assignment.**

This Agreement may not be assigned by Developer without the prior written approval of the City and RDA, which may withhold approval in their sole discretion. Assignment shall not be unreasonably withheld if the new entity is one in which the Developer principals maintain an ownership interest and are involved in management.

#### **Section 3.7 Developer Identity.**

As a condition precedent to the execution of this Agreement, Developer shall have submitted to the City and RDA a detailed description of the Developer and its principals, associates, employees, partners and joint ventures. The developer shall maintain full disclosure to the City and RDA of its principals, officers, stockholders, partners, joint ventures, and all other pertinent information concerning the Developer.

#### **Section 3.8 Indemnification.**

During the period of this Agreement, and until such time as the parties to the Agreement fail to reach accord on the execution of the Development, Developer shall defend, indemnify, assume all responsibility for and hold the City and RDA, and their officers, agents and employees, harmless from all claims or suits for, and damages to, property and injuries to persons, including accidental death (including attorney's fees and costs), to the extent caused by any of its representatives' activities under this Agreement, whether such activities or performance thereof by Developer or anyone directly or indirectly employed or contracted by Developer and whether such damage shall accrue or be discovered before or after termination of this Agreement, except to the extent such matters are caused by the negligence or willful misconduct of the City, the RDA, or their officers, agents or employees.

**Section 3.9 Attorneys' Fees.**

The prevailing Party in any action to enforce this Agreement shall be entitled to recover reasonable attorneys' fees and costs from the other Party or Parties (including fees and costs in any subsequent action or proceeding to enforce any judgment entered pursuant to an action of this Agreement). The Superior Court of the County of Imperial shall be the site and have jurisdiction for the resolution of all such actions.

**Section 3.10 Governing Law.**

This Agreement shall be governed by and construed in accordance with the laws of the State of California.

**Section 3.12 Severability.**

If a portion of this Agreement is determined to be invalid or unenforceable, the rest of the Agreement is not affected and remains valid and enforceable.

**Section 3.13 Entire Agreement.**

This Agreement, and its attachment, constitutes the entire agreement of the Parties regarding the Development.

**Section 3.14 Counterparts.**

This Agreement may be executed in counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same agreement.

**Section 3.15 Execution.**

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed the day and year first written.

DEVELOPER: Chelsea Investment Corporation

Date: 4/2/08

By: [Signature]  
Name/Title: James J. Schmid  
President

CITY: City of Calexico

Date: 4/10/08

By: [Signature]  
Ralph Velez, City Manager

Date: 4/10/08

Attested By: [Signature]  
Lourdes Cordova, City Clerk

RDA: Community Redevelopment Agency of  
the City of Calexico

Date: 4/10/08

By: [Signature]  
Ralph Velez, Executive Director

Date: 4/10/08

Attested By: [Signature]  
Lourdes Cordova, Secretary